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No. 86-393

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

JAMES B. STANLEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in reviving a Federal Tort Claims Act suit for injuries allegedly received by a serviceman during active duty participation in an official Army drug experimentation program, where the district court had entered an order under Fed. R. Civ. P. 54(b) dismissing the action pursuant to *Feres* v. *United States*, 340 U.S. 135 (1950), and no appeal was filed challenging that dismissal.

2. Whether a serviceman may pursue an action against his superior officers for alleged constitutional violations arising from his participation in an official Army drug experimentation program.

PARTIES TO THE PROCEEDING

In addition to the United States, the petitioners are Richard Helms, Joseph R. Bertino, M.D., Sidney Gottlieb, M.D., Bernard G. Elfert, Van Sim, M.D., H.D. Collier, and Albert Dreisbach. In addition, the state defendants in the proceedings below are the Board of Regents of the University of Maryland, Gerald Klee, M.D., and Walter Weintraub, M.D. The state defendants filed a petition for a writ of certiorari seeking review of the court of appeals' decision in this case. *Board of Regents of the University of Maryland, et al.* v. *Stanley, et al.*, No. 86-443. The respondent is James B. Stanley.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 786 F.2d 1490. The district court's orders granting the motion to dismiss the United States and denying the motion to dismiss the individual federal defendants (Pet. App. 54a-66a) are reported at 549 F. Supp. 327 and 552 F. Supp. 619. The district court's orders reconsidering its denial of the motion to dismiss the individual federal defendants (Pet. App. 21a-53a) are reported at 574 F. Supp. 474 and 587 F. Supp. 1071. A prior opinion of the United States Court of Appeals for the Fifth Circuit affirming in part an earlier district court order in favor of the United States (Pet. App. 67a-95a) is reported at 639 F.2d 1146.

JURISDICTION

The judgment of the court of appeals was entered April 21, 1986, and a petition for rehearing was denied June 17, 1986. The petition for a writ of certiorari was filed on September 9, 1986, and was granted on December 8, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. 1346(b) provides in part:

> Subject to the provisions of [28 U.S.C. 2671 *et seq.*], the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

STATEMENT

1. In February 1958, respondent, then an Army enlisted man, participated in secret chemical warfare tests conducted by the United States Army at the Army's Chemical Warfare Laboratories on the Aberdeen Proving Grounds in Maryland. He volunteered to participate in the program while on active duty and was administered, without his knowledge, lysergic acid diethylamide (LSD) as part of that testing.[1]

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[1] The Army administered LSD to approximately 1,000 individuals between 1955 and 1958, partially in response to evidence that the Soviet Union had purchased a quantity of

He returned to regular duty in March 1958 and served in the Army for 11 more years. He brought suit under the Federal Tort Claims Act (FTCA) in 1978, alleging that the government had been negligent in administering the LSD and negligent in failing to monitor his condition after discharge. Plaintiff claims that, as a result of ingesting LSD, he was "unable to perform his military duties efficiently," which led to the termination of his military career in 1969, and that he periodically "without reason, violently beat his wife and children," which led to the dissolution of his marriage in 1970. J.A. 5, ¶ 5.

Plaintiff's FTCA claims were initially dismissed by the district court, which held that they were barred by the doctrine of *Feres* v. *United States*, 340 U.S. 135 (1950). The Fifth Circuit affirmed in 1981 (Pet. App. 67a-95a). Finding that "the relationship between Stanley and the allegedly negligent individuals stemmed from their official military relationship," the court of appeals concluded that "we are compelled to conclude that the trial court correctly applied *Feres* and held the United States immune to Stanley's suit under the Federal Tort Claims Act" (*id.* at 76a, 79a). The Fifth Circuit, however, remanded the case to the district court for further proceedings, finding, without expressing any opinion on the merits, that "Stanley has at least a colorable con-

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LSD sufficient for 50 million doses. The administration of the drug to these individuals was for the purpose of "ascertain[ing] the effects of the drug on their ability to function as soldiers" and "to evaluate the validity of the traditional security training * * * in the face of unconventional, drug enhanced, interrogations." S. Rep. 94-755, 94th Cong., 2d Sess. 411-412 (1976).

stitutional claim based on *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 * * * (1971)" (*id.* at 94a).[2]

2. On remand, plaintiff amended his complaint to include FTCA claims against the United States and to add new *Bivens* claims against unknown military officers and civilians who had participated in the program. In 1982, the district court dismissed the amended FTCA claims on the basis of the Fifth Circuit's opinion (Pet. App. 56a-66a). However, relying on the Ninth Circuit's decision in *Wallace* v. *Chappell*, 661 F.2d 729 (1981) (Pet. App. 62a), the court declined to dismiss the *Bivens* claims against the individual defendants (*id.* at 66a). Shortly thereafter, on November 9, 1982, the district court entered, at the request of the United States, a partial final judgment dismissing all the FTCA claims pusuant to Fed. R. Civ. P. 54(b) (Pet. App. 54a-55a).[3] In the same order, the district court ordered plaintiff to identify and serve at least one individual defendant, and plaintiff thereafter filed, in 1983, a Second Amended

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[2] In so holding, the Fifth Circuit relied on a Third Circuit opinion which was subsequently overturned by the en banc Third Circuit in *Jaffee* v. *United States*, 663 F.2d 1226 (1981), cert. denied, 456 U.S. 972 (1982).

[3] Rule 54(b) provides in pertinent part:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

Complaint naming the individual petitioners.[4] Plaintiff did not appeal the entry of the final judgment dismissing his FTCA claims.

Subsequently, this Court reversed the Ninth Circuit's decision in *Chappell*, holding that "enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations." *Chappell* v. *Wallace*, 462 U.S. 296, 305 (1983) (footnote omitted). The Court ruled that preclusion of the *Bivens* remedy was necessary because of " 'special factors counselling hesitation' " (462 U.S. at 298, quoting *Bivens*, 403 U.S. at 396), which the Court found in the "unique disciplinary structure of the Military Establishment and Congress' activity in the field" (462 U.S. at 304). Acting sua sponte, the district court reconsidered its

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[4] In his Second Amended Complaint, plaintiff alleged that "[t]he wrongful act of the Defendants consists of an intentional act whi[le] Plaintiff was on active duty and subsequent negligent failure to protect Plaintiff, after becoming a civilian, from the dire consequences flowing from the original wrong" (J.A. 6-7, ¶ 11). Plaintiff further alleged that "[t]he Defendants, federal executive department officials and agents, * * * were acting under color of a covert federal Army pro-[gram]" (J.A. 7, ¶ 14). The complaint asserted that the alleged conduct of defendants violated plaintiff's "consitutional right to privacy * * * implicit in the First, Third, Fourth and Ninth Amendments * * * [and] implicit in the concept of liberty within the Fifth Amendment Due Process Clause, and generally within the 'penumbras' of the Bill[] of Rights" (J.A. 8, ¶ 17). Plaintiff also named as defendants the Board of Regents of the University of Maryland and several physicians who were employees of the University of Maryland, alleging that these state defendants participated in the testing program pursuant to "an agreement or contract" with "federal agencies" (J.A. 9, ¶ 20). Plaintiff thus asserted claims under 42 U.S.C. 1983 (Count II) and 42 U.S.C. 1985 (Count III) (J.A. 8-10).

prior refusal to dismiss the *Bivens* claims in light of this Court's decision in *Chappell*, but concluded that *Chappell* was "not controlling" because "plaintiff in the instant case did not participate in the Army's testing program because a superior officer ordered him to do so; instead * * * he volunteered" and "could have freely withdrawn" (Pet. App. 33a-34a). The district court thereafter certified this order for interlocutory appeal under 28 U.S.C. 1292(b) (J.A. 11-12), and the court of appeals accepted the appeal (*id.* at 13-15).

3. a. The court of appeals affirmed the district court's refusal to dismiss plaintiff's *Bivens* claims, holding that a case-by-case analysis was necessary under *Chappell* to determine whether the particular suit would undermine military discipline. Noting plaintiff's allegation that he had not been told that he was ingesting LSD, the court reasoned that "Stanley could not possibly have challenged his 'orders' to drink the clear substance" (Pet. App. 12a). Therefore, the court concluded, " '[t]he inescapable demands of military discipline and obedience to orders' are not implicated by the facts of this case" (*ibid.*, quoting *Chappell*, 462 U.S. at 300).

The court of appeals also found absent the other special factor, "Congress's plenary authority over the military and its extensive activity in the field" (Pet. App. 12a). This factor was absent, the court ruled, because the "intramilitary administrative procedures which the Court found adequate to redress the servicemen's racial discrimination complaints in *Chappell* are clearly inadequate to compensate Stanley for the violations complained of here," since Stanley did not have available to him "the remedies provided under article 138 of the Uniform Code of Military Justice" (*id.* at 12a-13a). The court did not address peti-

tioners' argument that the Veterans' Benefits Act constituted Congress's "activity in the field" and thus had to be considered under the "special factors" analysis of *Chappell*.

Having found that the "special factors" of *Chappell* were absent, the court also ruled that plaintiff's suit was not precluded by the remedial scheme afforded by the Veterans Benefits Act, 38 U.S.C. 301 *et seq.*, under the "adequate alternative remedy" analysis of *Carlson* v. *Green*, 446 U.S. 14, 18-19 (1980). Reasoning that the Act would not adequately compensate plaintiff, the court of appeals concluded that the Act was not the exclusive remedy for servicemen "injured while acting incident to military service" (Pet. App. 15a).

b. Acting sua sponte, the court of appeals went on to consider plaintiff's FTCA claims against the United States. Ignoring plaintiff's failure to appeal from the district court's 1982 Rule 54(b) final judgment dismissing these claims, the absence of the United States as a party on the appeal, and the lack of any briefing on the issue, the court overruled both the district court's final judgment and the Fifth Circuit's 1981 decision dismissing the FTCA claims in the previous complaint. It reinstated the FTCA claims against the United States.

The court acknowledged that the Fifth Circuit's decision was the "law of the case," but reasoned that such a decision need not be followed "when controlling authority has since made a contrary decision of the law applicable to the issue" (Pet. App. 17a). The court held that this "controlling authority" was provided by *Johnson* v. *United States*, 779 F.2d 1492 (11th Cir. 1986) (en banc), cert. granted, No. 85-2039 (Oct. 6, 1986), and *Cole* v. *United States*, 755

F.2d 873 (11th Cir. 1985). Relying also on *United States* v. *Shearer*, No. 84-194 (June 27, 1985), the court held that "under *Johnson*, *Cole*, and *S[illegible]er*, this case requires the case-by-case analysis to determine whether the purpose of the *Feres* doctrine would be served by precluding Stanley's FTCA claim against the government" (Pet. App. 19a). The court concluded that military discipline and effectiveness might not be undermined by permitting plaintiff to go forward with his FTCA claims, so that they are not "necessarily barred by the *Feres* doctrine" (*id.* at 20a). The court remanded the case with instructions to allow Stanley to amend his complaint "to plead consistent with recent precedent" (*ibid.*).

SUMMARY OF ARGUMENT

The court of appeals egregiously violated basic rules of appellate jurisdiction by reaching plaintiff's FTCA claims. The district court entered a final judgment pursuant to Fed. R. Civ. P. 54(b) dismissing those claims in 1982, and plaintiff never appealed that dismissal. Since his time to appeal expired in January 1983, the court of appeals lacked jurisdiction over the FTCA claims. Moreover, the court's jurisdiction was based on the district court's certification of the separate *Bivens* issue for interlocutory review pursuant to 28 U.S.C. 1292(b). Even if the time for appealing the dismissal of the FTCA claims had not expired, the court of appeals lacked jurisdiction to reach the FTCA claims while deciding the interlocutory appeal on the *Bivens* claims. The extent of the court of appeals' error is demonstrated by the fact that no FTCA question had been briefed or argued, and, indeed, the United States did not participate in the appeal.

In any event, the court of appeals erred in concluding that the FTCA claims were not necessarily barred. This Court recently reiterated that a service member may not recover "for injuries which 'arise out of or are in the course of activity incident to service.'" *United States* v. *Shearer*, No. 84-194 (June 27, 1985), slip op. 5, quoting *Feres* v. *United States*, 340 U.S. 135, 146 (1950). There is no real question that plaintiff's injuries were incurred incident to service, as the Fifth Circuit held in 1981, so plaintiff's FTCA claims are barred by the *Feres* doctrine for that reason. The court of appeals read *Shearer* as authorizing a case-by-case inquiry to determine whether military discipline and effectiveness would be undermined by permitting a plaintiff to go forward with an FTCA claim, even when the injury occurred incident to military service. To the contrary, *Shearer* makes clear that claims based on injuries incurred incident to military service are the type of claims that are barred by the *Feres* doctrine because they would almost inevitably call for second-guessing of military decisions by the civilian courts, to the detriment of military discipline and effectiveness. Moreover, there is no doubt that permitting plaintiff to go forward with his claim would involve the judiciary in sensitive military matters, since a central issue in plaintiff's case would be whether the Army erred by administering LSD to volunteers in the 1950s.

The court of appeals extended its incorrect application of the *Feres* doctrine in refusing to follow the clear and unequivocal statement of this Court's holding in *Chappell* v. *Wallace*, 462 U.S. 296 (1983), that service members are barred from bringing *Bivens*

claims against their superior officers. Instead, the court of appeals employed a case-by-case analysis, as it did in resurrecting plaintiff's FTCA claims. In so doing the court simply misread *Chappell*. The Court clearly held in that case that service members may not pursue *Bivens* actions against their superior officers, although it suggested that injunctive relief may be available in some cases.

Moreover, the two "special factors" identified in *Chappell*—the "unique disciplinary structure of the Military Establishment and Congress' activity in the field" (462 U.S. at 304)—mandate the conclusion that plaintiff is barred from pursuing his *Bivens* claims. In applying these factors, the court in this case accorded an extremely limited regard for the first factor by holding, in essence, that the only inquiry the court need make is whether the suit involves a challenge to a military order given to the plaintiff. However, the "unique disciplinary structure" of the military identified in *Chappell* is not so limited, but instead precludes military personnel from bringing claims that require civilian courts to second-guess military decisions. In applying the second special factor, the court of appeals limited *Chappell* to cases where the Code of Military Justice provided an alternative remedy, refusing even to acknowledge the Veterans Benefits Act as congressional "activity in the field." This Court's holding cannot reasonably be so limited.

ARGUMENT

I. THE COURT OF APPEALS LACKED JURISDICTION OVER PLAINTIFF'S FTCA CLAIMS

The court of appeals lacked jurisdiction over plaintiff's FTCA claims. In the absence of a timely appeal, there is no basis for review by the court of appeals of the district court's 1982 final judgment dismissing those claims. That is especially so where, as here, the court's jurisdiction was based on its action, taken pursuant to 28 U.S.C. 1292(b), to review the altogether separate *Bivens* issue certified by the district court.

Fed. R. Civ. P. 54(b) provides for the separate entry of final judgment "when more than one claim for relief is presented in an action * * * or when multiple parties are involved." The FTCA claims against the United States are plainly separate from the *Bivens* claims against the individual defendants, just as the United States is a party separate from the individual defendants. As required by Rule 54(b), the district court determined that there was "no just reason for delay" and expressly directed the clerk to "enter final judgment in favor of the United States" on November 9, 1982 (Pet. App. 55a). In accordance with Fed. R. Civ. P. 79(a), the clerk entered this order onto the docket the next day (J.A. 2).

A central purpose of Rule 54(b) certification is to establish a definite starting point for appellate proceedings. See *Curtiss-Wright Corp.* v. *General Electric Co.*, 446 U.S. 1, 8 (1980); *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 435-436 (1956). Accordingly, the lower courts have uniformly held that a judgment entered under Rule 54(b) must be ap-

pealed within the time permitted by Fed. R. App. P. 4, which in this case was 60 days. See, *e.g.*, *Federal Deposit Insurance Corp.* v. *Tripati*, 769 F.2d 507, 508 (8th Cir. 1985); *Exchange National Bank* v. *Daniels*, 763 F.2d 286, 291-292 (7th Cir. 1985); *Smith* v. *Mine Safety Appliances Co.*, 691 F.2d 724, 725 (5th Cir. 1982); see generally 6 J. Moore, *Moore's Federal Practice* ¶ 54.28[3.-3], at 54-155 (2d ed. 1986).[5] Since plaintiff did not appeal by January 1983, he forfeited any right to appeal the dismissal of his FTCA claims at that time.[6]

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[5] Unless a party against whom final judgment is entered is required to prosecute an immediate appeal upon pain of forfeiture, the prevailing party who has obtained a final judgment under Rule 54(b) would never know whether that judgment was in fact final until after all claims against all parties had been adjudicated and a final judgment entered under Fed. R. Civ. P. 58. Faced with such a possibility, a party would have no choice but to continue its participation in the litigation so as to remain apprised of its course and to protect any rights it may be in a position to assert. See, *e.g.*, *Scholl* v. *District of Columbia*, 331 F.2d 1018, 1020 (D.C. Cir. 1964); *Exchange National Bank*, 763 F.2d 286, 292 (7th Cir. 1985). In addition, allowing a party the option of a later appeal from a Rule 54(b) judgment would also interfere with the discretion of the district court to enter certification in the " 'interest of sound judicial administration.' " *Curtiss-Wright*, 446 U.S. at 8, quoting *Sears, Roebuck*, 351 U.S. at 437. By entering certification, the district court can elicit a final appellate resolution of a claim which may have overriding or controlling impact on some aspects of the case before it. Allowing a party (or, as here, a court of appeals) to ignore the absence of an appeal from such a certified order erodes the district court's ability to manage the cases on its docket.

[6] Plaintiff contends (Br. in Opp. 4, 10) that the order of November 9, 1982, and the clerk's entry of November 10, 1982, were deficient. He describes the order as "not self executing" because it provides that "the clerk shall enter final

Although it acknowledged that final judgment had been entered on these FTCA claims in 1982 (Pet. App. 5a), the court of appeals apparently felt that it was free to ignore the absence of a timely notice of appeal from this final judgment. That conclusion is wrong. With the single exception of appeals conducted under 28 U.S.C. 1292(b),[7] all appeals require that a notice of appeal be filed in accordance with Fed. R. App. P. 4. As this Court has noted, "[i]t is well settled that the requirement of a timely notice of appeal is '"mandatory and jurisdictional."'" *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982), quoting *Browder* v. *Director, Illinois*

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judgment in favor of the United States"; plaintiff apparently contends that the order should have read "final judgment is entered in favor of the United States." Plaintiff apparently considers the clerk's entry in the docket deficient for the same reason. There is no substance to this hyper-technical argument. Both the order and the entry in the docket clearly provided that partial final judgment had been entered in favor of the United States (see Pet. App. 55a; J.A. 2). Moreover, respondent understood that the court had dismissed the United States. In a letter to the district court on June 21, 1983, respondent's counsel stated that "[l]ast October you wrote a detailed order * * * wherein you dismissed the Plaintiff's FTCA claim against the U.S. Government due to the *Feres* doctrine" (Pet. Reply Memo App. 2a). The court of appeals also understood that the FTCA claims had been dismissed. It noted that "[u]pon motion by the government, on November 9, 1982, the district court entered final judgment in favor of the government" (Pet. App. 5a).

[7] In the case of appeals conducted under Section 1292(b), the function of a notice of appeal is served by the requirement that the party file a petition for permission to appeal within the 10 days mandated by Fed. R. App. P. 5. Rule 5(d) provides that a notice of appeal need not be filed after permission has been granted.

Dep't of Corrections, 434 U.S. 257, 264 (1978); 28 U.S.C. 2107. No notice of appeal whatsoever has been filed from the November 9, 1982, final judgment. Thus, in reaching the merits of plaintiffs' FTCA claims, the court of appeals has simply done away with a prerequisite to its jurisdiction. There is no conceivable justification for the court of appeals' action.

The court's assumption of jurisdiction over the FTCA issue is remarkable in another sense. Here, the court's appellate jurisdiction was not based on 28 U.S.C. 1291 to review an otherwise final judgment into which all prior, non-final orders had been merged under Rule 54. Rather, this was a permissive interlocutory appeal under 28 U.S.C. 1292(b) based on the district court's certification of the *Bivens* question for appellate review (see J.A. 11-15). It is well established that on such an interlocutory appeal, "the scope of the issues open to the court of appeals is closely limited to the order appealed from" and does not extend to "matters ruled upon in other orders." 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* 143 (1977); see also *Pritchard-Keang Nam Corp* v. *Jaworski*, 751 F.2d 277, 280-281 n.3 (8th Cir. 1984), cert. dismissed, 472 U.S. 1022 (1985); *United States* v. *Bear Marine Services*, 696 F.2d 1117, 1118-1119 n.1 (5th Cir. 1983). Under this test, there can be no doubt that the court of appeals' jurisdiction over the *Bivens* order certified by the district court could not extend to the district court's final order dismissing the FTCA claims in 1982.

In short, the jurisdiction of the court of appeals in this case was predicated on Section 1292(b) to review the *Bivens* issue that was altogether separate

from respondent's previously dismissed FTCA claim. It was on this basis that the parties briefed and argued the case. The United States, because it had been dismissed as a party, did not participate in the proceedings in the Eleventh Circuit.[8] There was no briefing or argument on the FTCA claims, which the parties assumed had been disposed of in 1982. Yet, notwithstanding the limited posture of the appeal, and without any warning, the court resurrected the FTCA claims against the United States. This action, which deprived the United States of its basic right to be heard, flagrantly violated the rules governing appellate jurisdiction.[9]

II. PLAINTIFF'S FTCA CLAIMS AND *BIVENS* CLAIMS ARE BARRED BECAUSE THEY ARE THE TYPES OF CLAIMS THAT UNDERMINE MILITARY DISCIPLINE AND EFFECTIVENESS

The *Feres* doctrine bars FTCA claims for injuries received by service members which " 'arise out of or are in the course of activity incident to service.' "

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[8] Indeed, the United States is not named as a defendant in plaintiff's Second Amended Complaint (J.A. 3), which contains no FTCA claim.

[9] Plaintiff asserts (Br. in Opp. 11) that he would be able to obtain relief under Fed. R. Civ. P. 60(b), which provides for relief from final judgments in certain circumstances. However, we know of no authority authorizing a court of appeals to reopen a final judgment more than three years after it was entered because (as the court of appeals incorrectly concluded (Pet. App. 17a)) controlling authority had changed in the interim. Moreover, such a rule would obviously prevent parties from ever knowing with any certainty that a case had been resolved. Such a holding would also completely bypass the district court and its role in adjudicating Rule 60(b) motions.

United States v. *Shearer*, No. 84-194 (June 27, 1985), slip op. 4-5, quoting *Feres* v. *United States*, 340 U.S. 135, 146 (1950). In *Chappell* v. *Wallace*, 462 U.S. 296, 305 (1983) (footnote omitted), this Court found the *Feres* doctrine enlightening in holding that "enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations." Relying primarily on its prior decision in *Johnson* v. *United States*, 779 F.2d 1492 (11th Cir. 1986) (en banc), cert. granted, No. 85-2039 (Oct. 6, 1986), the court of appeals in this case ignored these controlling principles and permitted plaintiff to go forward with FTCA claims and *Bivens* claims even though plaintiff's alleged injuries arose out of his military service. While the court committed other errors as well (particularly by reaching the FTCA issue, which was not before it), one fundamental error underlies the court's decision in this case. The court failed to understand that damage actions by military personnel based on injuries incurred incident to military service are "the *type* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness" (*Shearer*, slip op. 6-7 (emphasis in original)). Accordingly, such claims, whether brought as FTCA claims or as *Bivens* claims, are barred.

A. The Court Of Appeals Erred By Holding That Plaintiff's FTCA Claims Are Not Necessarily Barred By The *Feres* Doctrine

The court of appeals' lack of jurisdiction to decide the FTCA claims effectively obviates the need for this Court to consider whether the court erred in concluding that they are not necessarily barred by the *Feres* doctrine. However, it is clear that plaintiff's

FTCA claims are barred. As we explained in our brief in *Johnson*,[10] under the *Feres* doctrine a service member "may not recover under the Federal Torts Claims Act for injuries which 'arise out of or are in the course of activity incident to service.'" *United States* v. *Shearer*, No. 84-194 (June 27, 1985), slip op. 4-5, quoting *Feres*, 340 U.S. at 146. In this case it is clear that plaintiff's injuries were incurred incident to military service. Plaintiff alleges that he was injured while "on active duty" (J.A. 6, ¶ 11) participating in a "covert federal Army pro[gram]" (J.A. 7, ¶ 14) involving the use of Army volunteers at the Aberdeen Proving Grounds in Maryland, an Army base. As the Fifth Circuit held in its prior decision in this case, these facts make plain that "the relationship between Stanley and the allegedly negligent individuals stemmed from their official military relationship" (Pet. App. 76a). It properly held that plaintiff's claims are barred because his alleged injuries were incurred incident to military service. Moreover, even under a case-by-case approach, plaintiff's effort to challenge in civilian courts military decisions which affected him solely because he was a member of the military must be barred in light of its obvious effect on military discipline and effectiveness.

1. The court of appeals did not take issue with the Fifth Circuit's conclusion that Stanley was injured incident to his military service. Rather, relying on the decision in *Johnson* v. *United States*, 749 F.2d 1530 (11th Cir. 1985), reinstated, 779 F.2d 1492 (11th Cir. 1986) (en banc), the court held that the Fifth Circuit had erred in failing to "proceed to the

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[10] We have sent a copy of our brief in *Johnson* to counsel for respondent.

next level of inquiry to determine whether the considerations underlying the *Feres* doctrine militated against permitting Stanley to bring the FTCA claim" (Pet. App. 17a). While our petition and brief in that case make clear our view that *Johnson* was wrongly decided, the court of appeals has far extended *Johnson* in this case. In *Johnson* the court held that a case-by-case inquiry was required only in those cases which fall outside of "the typical *Feres* factual paradigm—an FTCA suit for injuries or death allegedly caused by the negligence of a serviceman or an employee of the armed services" (749 F.2d at 1537). That "factual paradigm" is obviously present in this case since Stanley alleges that his injuries were caused by Army officers and other employees (or contractors) of the Army. Thus, in extending *Johnson* to the facts of this case, the court of appeals has simply abandoned any restriction on a case-by-case application of the *Feres* doctrine.

As in *Johnson*, the court of appeals justified its approach (Pet. App. 19a) as mandated by this Court's statement in *Shearer* that "[t]he *Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases" (*Shearer*, slip op. 5). The court misread *Shearer*. The statement in *Shearer* on which the court relied was made in the context of rejecting the clear rule applied by the Third Circuit in that case that the *Feres* doctrine did not bar an FTCA suit where the plaintiff's decedent was off-duty and off-base when killed by his fellow servicemen (see 723 F.2d 1102, 1106 (1983)). The Court in *Shearer* did not reject the well-settled rule that claims based on injuries incurred incident to military service are barred. Indeed, the Court reiterated the principle first enunci-

ated in *Feres* that service members may not recover "for injuries which 'arise out of or are in the course of activity incident to service' " (*Shearer*, slip op. 5, quoting *Feres*, 340 U.S. at 146).

Furthermore, the Court's analysis in *Shearer* is fundamentally inconsistent with the case-by-case approach adopted by the Eleventh Circuit in this case and in *Johnson*. In *Shearer* this Court rejected the plaintiff's argument that she could bring suit alleging that the Army had been negligent in failing to exercise better control over the activities of the servicemen who had killed the plaintiff's decedent, reasoning that such a suit "goes directly to the 'management' of the military; it calls into question basic choices about the discipline, supervision, and control of a serviceman" (slip op. 6 (footnote omitted)). As the Court explained, such a suit would necessarily "mean that commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions" (*ibid.*). Such decisions, the Court reasoned, are "decisions of command," and suits attacking such decisions are "the *type* of claims, that if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness" (slip op. 6-7 (emphasis in original)).

The lesson of *Shearer* is that claims based on injuries incurred incident to service (as determined by assessing all relevant circumstances including but not limited to whether the service member was on duty or on a military base at the time of the injury) are barred by the *Feres* doctrine, and that other claims are barred as well if they are of a type that will lead to the impairment of military discipline and

effectiveness. The Court made clear that claims based on injuries incurred incident to service are barred by so stating (slip op. 5) and by explaining (*id.* at 6-7) that the claims involved in *Feres* (which included two medical malpractice claims) are the types of claims that will necessarily involve the courts in sensitive military affairs. The Court did not authorize a case-by-case inquiry into whether particular claims will undermine military discipline and effectiveness where it is clear that the injury occurred incident to service.

2. Moreover, even under a case-by-case approach it is clear that plaintiff's claim is barred. Here, as in *Shearer*, plaintiff is challenging "decisions of command," *i.e.*, decisions concerning whether and how to use him as an Army volunteer in conducting chemical warfare experiments in the late 1950s. The courts below erred by focusing exclusively on the fact that the questioned action did not involve an "order" which respondent could, at the time, have challenged or disobeyed. The *Feres* doctrine encompasses far more than simply those cases in which an order directed to the plaintiff would be at issue. Indeed, in *Feres* the plaintiffs' claims arose from negligent medical treatment and the operation of a defective heating plant that led to a barracks fire, and did not involve any challenge to any particular order. Nor did *Shearer* involve any particular order.

By focusing on whether a particular order was at issue, the court ignored the basic thrust of the *Feres* doctrine, which is that members of the military should not be able to challenge military decisions in civilian courts. *United States* v. *Muniz*, 374 U.S. 150, 162 (1963); *United States* v. *Brown*, 348 U.S. 110, 112 (1954). As noted in *Chappell* and reiterated

in *Shearer*, " 'complex, subtle, and professional decisions as to the composition, training, * * * and control of a military force are essentially professional military judgments' " (*Shearer*, slip op. 6, quoting *Chappell*, 462 U.S. at 302). What matters is "whether the suit requires the civilian court to second-guess military decisions" or "might impair essential military discipline." (*Shearer*, slip op. 5). As stressed in *Chappell*, " 'courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have' " (462 U.S. at 305, quoting Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181, 187 (1962)).[11]

Plainly, plaintiff's suit will necessarily involve second-guessing of military decisions concerning the use of Army personnel. If it can go forward, there is no apparent basis for barring many other present or former soldiers from going to court to challenge the manner of their treatment by military superiors. Many military decisions are difficult precisely because they involve exposing people to significant risks of harm. Inquiry into them will, as here, embroil civilian courts in the reassessment of sensitive military decisions. Accordingly, plaintiff's claims must be barred by the *Feres* doctrine, even under the case-by-case approach.

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[11] However, the Court in *Chappell*, citing cases where injunctive relief was granted at the behest of a member of the military, noted that military personnel are not "barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service." 462 U.S. at 304-305; see pages 24-26, *infra*.

B. The Court Of Appeals Erred By Holding That Plaintiff's *Bivens* Claims Are Not Barred By *Chappell*

The court of appeals compounded its erroneous application of *Feres* by holding that *Chappell* does not necessarily bar plaintiff's *Bivens* claims. This ruling flies in the face of this Court's unequivocal statement of its holding in *Chappell*: "We hold that enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations" (462 U.S. at 305 (footnote omitted)). This statement makes plain that no case-by-case analysis as to whether military discipline would be undermined by a particular suit is warranted. Moreover, even assuming that a case-by-case inquiry is warranted, it is clear that the same special factors that led the Court in *Chappell* to conclude that the plaintiff in that case could not bring a *Bivens* suit compel the conclusion that plaintiff may not pursue his *Bivens* claims.

1. Other than the courts below, every court that has considered the question has concluded that *Chappell*'s bar to damage suits against military superiors means exactly what it appears to mean, which is that enlisted military personnel may not bring *Bivens* suits, and that no case-by-case inquiry is required to determine whether a particular suit is barred.[12] In

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[12] Even counsel for plaintiff believed at one point in this litigation that *Chappell* barred plaintiff's *Bivens* claims. He stated, in a letter to the district court shortly after the decision in *Chappell*, that "we are ethically compelled to cite to the court a recent Supreme Court decision which, we regret to say, is apparently dispositive of this case" (Pet. Reply Memo App. 1a). Counsel went on to say that the Court in *Chappell* "held that the same principles which underly [*sic*] the *Feres* doctrine and which require absolute immunity

Mollnow v. *Carlton*, 716 F.2d 627, 630 (1983), cert. denied, 465 U.S. 1100 (1984), the Ninth Circuit ruled that "[b]y rejecting this court's consideration of such 'reviewability factors' as the adequacy of the intraservice remedy, we believe that the [*Chappell*] Court necessarily imposed a *per se* prohibition on the filing of *Bivens*-type actions by servicemen against their superiors." Or, as succinctly stated by the Fourth Circuit, the rule established by *Chappell* is that "a *Bivens*-type claim * * * is barred by the intramilitary immunity." *Trerice* v. *Summons*, 755 F.2d 1081, 1084 (1985). As the Fifth Circuit reasoned in *Gaspard* v. *United States*, 713 F.2d 1097, 1103 (1983), cert. denied, 466 U.S. 975 (1984), "[t]he need for plenary discretion in military affairs and the existence of an adequate, congressionally imposed compensation scheme instruct us to avoid either imposing *or inquiring into* monetary damages when a service person is injured" (emphasis in original).

In *Jorden* v. *National Guard Bureau*, 799 F.2d 99, 107 (1986), the Third Circuit considered the decision below and concluded that "the *Stanley* court misread *Chappell*." [13] The court in *Jorden* construed *Chappell* as "laying down a general rule barring damages actions by military personnel against superior officers for constitutional violations, rather than authorizing a factual inquiry" (*id.* at 108). As

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from an FTCA action also require immunity from a *Bivens* constitutional action against federal officers" (*id.* at 2a).

[13] While decided before *Chappell*, the Third Circuit in *Jaffee* v. *United States*, 663 F.2d 1226 (1981) (en banc), cert. denied, 456 U.S. 972 (1982), anticipated the reasoning of *Chappell* exactly, holding that *Feres* principles precluded any *Bivens* cause of action under the "special factors" analysis employed by this Court in *Chappell* (663 F.2d at 1236-1237).

the court further explained, "[t]he *Stanley* court's approach would frequently require courts to make difficult and hair-splitting distinctions as to whether a particular claim was the sort that, if legally actionable, would threaten military discipline." (*id.* at 107-108).[14]

Ignoring entirely this Court's statement of its holding, the court of appeals below focused instead on the observation in *Chappell* that "'[t]his Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service'" (Pet. App. 11a, quoting 462 U.S. at 304). Viewing this statement as a rejection of any per se rule disallowing *Bivens* suits, the court of appeals reasoned that *Chappell* permits a case-by-case determination as to whether the "special factors" present in *Chappell* are in fact present in this case (Pet. App. 12a-13a).[15]

The court of appeals obviously misunderstood the Court's statement that military personnel are not

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[14] The district courts other than the court below have also been unanimous in reading *Chappell* as an absolute bar to *Bivens* claims by enlisted personnel against their superior officers. See *Alvarez* v. *Wilson*, 600 F. Supp. 706 (N.D. Ill. 1985); *Benvenuti* v. *Dep't of Defense*, 587 F. Supp. 348 (D.D.C. 1984); *Hampton* v. *United States*, 575 F. Supp. 1180 (W.D. Ark. 1983); *Bishop* v. *United States*, 574 F. Supp. 66 (D.D.C. 1983).

[15] The district court acknowledged the existence of the Court's "sweeping concluding statement" in *Chappell*, but, relying on the Court's additional statement that military personnel are not barred from obtaining any redress in the civilian courts, concluded that "[t]he obvious import of the Court's qualified holding is to limit the *Chappell* decision to its facts" (Pet. App. 29a).

barred entirely from obtaining judicial redress. After making that statement, the Court cited three cases—*Brown* v. *Glines*, 444 U.S. 348 (1980), *Parker* v. *Levy*, 417 U.S. 733 (1974), and *Frontiero* v. *Richardson*, 411 U.S. 677 (1973)—in none of which was a service member seeking damages. Instead, *Brown* and *Frontiero* involved claims for injunctive relief and *Parker* was a habeas corpus case. The other courts of appeals that have considered *Bivens* claims after *Chappell* have all understood the Court's statement as preserving some rights to relief other than damages (*Jorden*, 799 F.2d at 107; *Gaspard*, 713 F.2d at 1103 n.12; *Trerice*, 755 F.2d at 1083; and *Mollnow*, 716 F.2d at 629 n.4),[16] while barring claims for damages.[17] The courts below erred by

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[16] Of course, claims for relief other than damages can also entail excessive interference by the judiciary in military affairs, and must be barred in some circumstances. See *Gilligan* v. *Morgan*, 413 U.S. 1 (1973); *Mindes* v. *Seaman*, 453 F.2d 197, 201 (5th Cir. 1971); *Dillard* v. *Brown*, 652 F.2d 316, 322 (1981).

[17] Although the Court reserved the question in *Chappell*, noting that it "was not adequately addressed either by the Court of Appeals or in the briefs and oral argument before this Court" (462 U.S. at 305 n.3), the courts of appeals have uniformly held that the reasoning of *Chappell* precludes suits by enlisted personnel under the various civil rights statutes. See, *e.g.*, *Jorden* v. *National Guard Bureau*, 799 F.2d 99, 104-107 (3d Cir. 1986); *Brown* v. *United States*, 739 F.2d 362, 366-367 (8th Cir. 1984), cert. denied, No. 84-636 (July 1, 1985); *Martelon* v. *Temple*, 747 F.2d 1348, 1350-1351 (10th Cir. 1984), cert. denied, 471 U.S. 1135 (1985). While the court of appeals in this case declined to reach this issue (Pet. App. 20a); we agree with the state defendants (86-443 Pet. 16-19) that it makes little sense to preclude FTCA claims against the United States and *Bivens* suits against individuals under the *Feres* doctrine, but to permit

failing to understand that this Court flatly barred service members from seeking damages while preserving their right to obtain other sorts of relief in some cases.[18]

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suits by enlisted personnel challenging the same conduct under the civil rights statutes. That is especially true where, as here, the state defendants are alleged to be cooperating with the federal government in an official Army program (see J.A. 7, ¶ 14). While plaintiff claims (Br. in Opp. 6) that it is not clear exactly what role the state defendants played, it is absolutely clear that the LSD testing program at issue was an official Army program. See S. Rep. 94-755, 94th Cong., 2d Sess. 392, 411-412 (1976).

[18] Claims for personal liability in damages pose an especially grave threat to military discipline and effectiveness. *Jorden*, 799 F.2d at 110. As this Court has repeatedly recognized, the threat of personal liability can substantially inhibit officials in the performance of their duties. See, *e.g.*, *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982); *Butz* v. *Economou*, 438 U.S. 478 (1978); *Barr* v. *Matteo*, 360 U.S. 564 (1959). Such inhibition, which should be avoided where possible in the civilian context, is particularly dysfunctional in the military context where national survival in war may depend on unquestioning obedience to military orders. See *Chappell*, 462 U.S. at 304 (noting "the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel"); *Goldman* v. *Weinberger*, No. 84-1097 (Mar. 25, 1986), slip op. 3 (" '[T]he military must insist upon a respect for duty and a discipline without counterpart in civilian life,' " quoting *Schlesinger* v. *Councilman*, 420 U.S. 738, 757 (1975)). Accordingly, as the Court held in *Chappell*, military personnel should be barred from pursuing *Bivens* actions. Thus, it is important that the bar to *Bivens* actions be a total bar. If the question whether superior officers are susceptible to damage actions depends on the balancing of various factors by civilian courts, then the behavior of those officers may be affected regardless of how a court would ultimately resolve the question.

2. Even if this Court had not plainly held in *Chappell* that military personnel are barred from bringing *Bivens* claims seeking damages from their superiors, the court of appeals clearly erred in its application of the two special factors that this Court identified in *Chappell* to the facts of this case. Because military discipline and effectiveness would be undermined by permitting plaintiff's *Bivens* action to go forward, and because Congress has provided in the Veterans' Benefits Act that service members injured incident to military service can obtain recovery, it would be inappropriate to authorize plaintiff to bring a *Bivens* action even if the matter were open to question. Reversal of the court of appeals' holding that plaintiff may pursue his *Bivens* claim is therefore appropriate on this independent ground.

a. The court of appeals reasoned that the first "special factor" identified in *Chappell*, the "unique disciplinary structure of the Military Establishment" (462 U.S. at 304), was not present in this case because Stanley was a volunteer in the chemical warfare experiments and thus "was not subject to direct military orders" (Pet. App. 12a). The court of appeals found "[m]ost important" the fact that Stanley "was surreptitiously administered the drug" and thus "could not possibly have challenged his 'orders' to drink the clear substance" (*ibid.*). As explained above (pages 20-21), the court of appeals' exclusive focus on whether the plaintiff could have disobeyed his order is a far too niggardly construction of this special factor, which "seems [to] best explain[]" this Court's decision in *Feres* (*Chappell*, 462 U.S. at 299). What matters is not whether a particular order is at issue, but whether "the trial would * * * involve second-guessing military orders" or "require

members of the Armed Services to testify in court as to each other's decisions and actions" in a case involving injury to a service member. *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 673 (1977); see also *Shearer*, slip op. 5.

In this case, Stanley alleges that he was given LSD as part of an official Army chemical warfare program (J.A. 7, ¶ 14). Plaintiff's suit thus necessarily constitutes a direct attack on the Army's decision to conduct these experiments as well as its decision to use volunteers. As in *Shearer*, plaintiff's suit in this case "goes directly to the 'management' of the military; it calls into question basic choices about the discipline, supervision, and control of a serviceman" (slip op. 6). Whatever the wisdom of the decision to conduct these experiments in 1958,[19] the *Feres* doctrine as applied in *Chappell* makes clear that it is not the task of the judiciary to second-guess such decisions through damage actions by enlisted men against their superior officers. See *Goldman*, slip op. 4.[20]

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[19] While LSD is now known to be a dangerous drug, it should be noted that the state of knowledge concerning its effects was far less complete in the late 1950s when the Army's experiments were conducted. See H. R. Rep. 815, 86th Cong., 1st Sess. 9-10 (1959) (noting that "psychochemicals" were "almost completely unknown" as recently as "[f]ive or six years ago"). It was then thought that the incapacitating effects of psychochemicals were only "temporary" and thus that they were ideal for use in the situation "where military necessity requires control of a situation, but where there is good reason for not harming either the surrounding population or even the intended target troops" (*id.* at 10-11).

[20] Plaintiff suggests (Br. in Opp. 15) that this case is distinguishable from *Chappell* because the alleged tortfeasors

b. The court of appeals also erred in its analysis of the second special factor identified in *Chappell*. In *Chappell*, the Court noted that Congress had enacted the Code of Military Justice—"a comprehensive internal system of justice to regulate military life" (462 U.S. at 302). This "activity in the field" by Congress, the Court reasoned, constituted a second special factor precluding a *Bivens* remedy, even though the Code of Military Justice did not permit any recovery of damages (462 U.S. at 304). The court of appeals simply ignored this reasoning, finding that "[t]hose intramilitary administrative procedures which the Court found adequate to redress the servicemen's racial discrimination complaints in *Chappell* are clearly inadequate to compensate Stanley for the violations complained of here" because "Article 138 [of the Code of Military Justice] is not available to veterans" (Pet. App. 12a-13a).

This reasoning misses the point that the special factor identified in *Chappell* was "Congress' activity in the field," not the presence of an adequate alternative remedy to a *Bivens* action,[21] and certainly not the

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are not his "superior officers." There is no merit to this distinction. Plaintiff's claim is clearly based on decisions made by military personnel superior to him, so he is challenging decisions of superior officers.

[21] In *Carlson* v. *Green*, 446 U.S. 14, 18-23 (1980), the Court determined that a *Bivens* suit on behalf of a federal prisoner was not precluded in circumstances where the FTCA provided an alternative, but not a fully adequate alternative remedy, and no other "special factors" counselled hesitation. In *Chappell* the Court noted that two special factors counselled hesitation, the *Feres* doctrine and the existence of an alternative remedy, even though the alternative remedy available in *Chappell* was not fully adequate under the standards set out in *Carlson*, since it did not provide compensatory damages,

applicability of the Article 138 of the Code of Military Justice. In this case, the Congressional activity in the field is the Veterans Benefits Act, which provides compensation and medical care to servicemen injured in the line of duty.[22] The court of appeals

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much less punitive damages, or authorize a jury trial (compare 462 U.S. at 303-304 with 446 U.S. at 21-23). Thus, it seems clear under *Carlson* that the existence of an alternative remedy that is not fully adequate will not by itself generally lead to the conclusion that a *Bivens* action is precluded. Howver, it is also clear under *Chappell* that the existence of an alternative remedy is a special factor showing congressional "activity in the field" that weighs against the recognition of a *Bivens* action. Together with other special factors, the existence of an alternative remedy that is not fully adequate must be considered to determine whether a *Bivens* action is precluded.

[22] Respondent complains (Br. in Opp. 21) that he has not obtained benefits under the Veterans' Benefits Act, and suggests (*id.* at 19 n.9) that we concede that the Act does not provide him with a remedy. These statements demonstrate misunderstanding of the Act and our position. Respondent does not allege that he applied for veterans' disability benefits, and we are informed that he has not applied; of course, a person must apply in order to obtain benefits. 38 U.S.C. 3001(a). If respondent demonstrates that he suffers from a disability as a result of his ingestion of LSD in 1958, as he appears to suggest (J.A. 8, ¶ 18), then he is entitled to compensation. 38 U.S.C. 331. But, as *Chappell* makes clear, it is not the adequacy of the remedy, but rather Congress's "activity in the field" (462 U.S. at 304), that constitutes the "special factor" which led this Court to conclude that a *Bivens* remedy is not available to military personnel for torts allegedly committed by their superior officers. Thus, even if the Veterans' Benefits Act does not provide what plaintiff would consider to be a complete remedy (such as damages to compensate him for the dissolution of his marriage), its existence is nevertheless a special factor weighing against the recognition of a *Bivens* remedy.

never considered that Act under the special factors analysis of *Bivens* and *Chappell*.[23] By letting its reasoning turn on the fact that the Code of Military Justice is unavailable to veterans, the court of appeals limited the special factor of Congress's activity in the field to the case where that particular statute provides an adequate form of relief.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[23] The court of appeals did address the Veterans' Benefits Act in the context of rejecting it as an adequate alternative remedy under the analysis of *Carlson* v. *Green*, 446 U.S. 14, 18-19 (1980). See Pet. App. 13a-16a & n.4. Contrary to the court of appeals' statement (*id.* at 13a), defendants had never argued that the Act was a fully adequate alternative remedy, but had argued instead that the Act constituted "Congress' activity in the field" under the analysis of *Chappell*. The court of appeals simply ignored this argument.

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